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October 8, 2010

Hon. William K. Sessions, III  
Chairman  
US Sentencing Commission  
One Columbus Circle NE  
Suite 2-500  
Washington DC 20002-8002

## Re: Emergency Amendments Pursuant to the Fair Sentencing Act of 2010

Dear Judge Sessions:

The Commission requested public comment with respect to implementation of the Fair Sentencing Act of 2010<sup>1</sup> (the "Act") and Congressional directives to review and amend the Guidelines to "decrease penalties involving cocaine base ("crack cocaine")" and to "account for certain aggravating and mitigating circumstances in drug trafficking cases."

NACDL is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's 10,000-plus direct members in 28 countries – and 90 state, provincial and local affiliate organizations totaling more than 40,000 attorneys – include private criminal defense lawyers, public defenders, military defense counsel, law professors and judges committed to preserving fairness and promoting a rational and humane criminal justice system.

### Introduction

The Act is the culmination of decades of reform efforts to ameliorate the disparate impact and undue severity of the federal

<sup>1</sup> Pub. L. No. 111-220, 124 Stat 2372 (Aug. 3, 2010).

sentencing scheme for crack cocaine offenses, jointly established by the federal criminal code and sentencing guidelines.

The Congressionally mandated 100:1 ratio proved unfair largely due to the fact that the more severe crack cocaine penalties had a noticeably disparate racial impact on sentencing outcomes.<sup>2</sup> African Americans and other minorities received significantly greater sentences than their white counterparts.<sup>3</sup> Eighth Circuit Judge Gerald Heaney “blames race-based disparity on discretionary decisions by the legislative and executive branches.”<sup>4</sup> While we realize this goes further than the dictates of the Fair Sentencing Act, NACDL urges the Commission to equalize the manner in which cocaine offenders are sentenced.

NACDL’s recommendations flow from the association’s commitment to parity in cocaine sentencing and from the principle of parsimony, the “overarching instruction” of 18 U.S.C. § 3553(a) that a sentence must be “sufficient, but not greater than necessary” to achieve statutory sentencing purposes.<sup>5</sup>

#### **A. Changes to Statutory Terms of Imprisonment for Crack Cocaine**

While the Fair Sentencing Act of 2010 represents a major step forward in the effort to reduce unwarranted sentencing disparities and promote “certainty and fairness,”<sup>6</sup> the 18:1 ratio created by the Act will not eliminate unwarranted disparity. To achieve that goal, the Guidelines for all cocaine offenses should be equalized. Of the two options set forth by the Commission’s request for comment, NACDL supports an amendment anchoring the 28-gram threshold to offense level 24 rather than 26.

We strongly oppose amendment of Application Note 3 to §2D1.1, providing cumulative punishment for weapon possession under subsection (b)(2) to add “violence.” We believe this change would often yield sentences “greater than necessary” to achieve the purposes of sentencing and, in many cases, would result in unwarranted double counting.

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<sup>2</sup> See Paul J. Hofer, Kevin R. Blackwell, and Barry Ruback, *The Effect of the Federal Sentencing Guidelines on Inter-Judge Sentencing Disparity*, 90 J. CRIM. L. & CRIMINOLOGY 239, 249 (1999).

<sup>3</sup> Benson Weintraub, *Hidden Disparity Under the Sentencing Guidelines*, 4 FED. SENTENCING REP. 148, 149 (1991), *citing* Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 188 (1991).

<sup>4</sup> *Id.*

<sup>5</sup> See *Kimbrough v. United States*, 552 U.S. 85, 128 S.Ct. 558, 563, 169 L.Ed.2d 481 (2007).

<sup>6</sup> 28 U.S.C. §991(b)(1)(B).

## B. Enhancements and Adjustments

### Structural Implementation of Congressional Mandates

The Act directs the Commission to “review and amend the Federal sentencing guidelines to ensure that the guidelines provide an additional” increase (or reduction) for various factors. The Commission responded by proposing a series of Chapter Two specific offense characteristics and Chapter Three adjustments that implement the requirements of the Act.

However, Congress did not specify that its mandate must be effectuated through Chapters Two or Three to the exclusion of any other element of the sentencing calculus under the advisory Guidelines. In contrast, the pre-*Booker* Sarbanes-Oxley Act of 2002 (SOX) expressly directed the Commission to promulgate “a specific offense characteristic enhancing... [Section] 2B1.1... for a fraud offense that endangers the solvency or financial security of a substantial number of victims.”<sup>7</sup> SOX also directed the Commission to amend the “base offense level and existing enhancements contained in... [Section] 2J1.2...”<sup>8</sup> The Fair Sentencing Act lacks this specificity leaving the manner of implementation of the directives fully in the Commission’s “expert” hands.

NACDL proposes that the “violence” enhancement—and the myriad other enhancements/mitigators and adjustments subject to public comment—be incorporated into Chapter 5K as potential grounds for guided departure. This would ensure that in appropriate cases the enhancement or mitigation will incrementally increase/decrease a guideline without bearing the imprimatur of general application associated with an SOC or adjustment. Thus, as the last step in the *Booker* consultative process, the sentencing judge must find that the conduct in question is present to an extraordinary degree before departing on that basis.

As to each of the proposed factors, irrespective of whether they enhance or mitigate the offense level, simplification of the Guidelines would be well-served by amending Chapter 5K as opposed to Chapters 3 or 4.<sup>9</sup> The terms of the Act are met by

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<sup>7</sup> Pub. L. No. 107-204, 116 Stat. 745 at §805(a)(4). Other mandates in the Sarbanes-Oxley Act contain broader language similar to that used in the FSA but which fail to specify under which Chapter of the *Guideline Manual* the amendments should be placed. *Id.* at §905(a)(“[T]he United States Sentencing Commission shall review and, as appropriate, amend the Federal sentencing guidelines and policy statements to implement the provisions of this Act.”) *Id.*

<sup>8</sup> Pub. L. No. 107-204, 116 Stat. 745 at §805(a)(1).

<sup>9</sup> See Cynthia Cotts, *Judges Call on U.S. to Simplify Sentencing Guidelines* (July 8, 2009), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a>. See also Kevin R. Reitz, American Law Institute, Model Penal Code: Sentencing Report

including the statutory increases/decreases under Chapter Five since they must be consulted by the sentencing judge in keeping with *Booker* and its progeny.

### **NACDL Proposes Importing “Safety Valve” Definition of Violence**

The most sensible definition of violence should be imported from the provisions of the “safety valve.”<sup>10</sup> This would promote uniformity and consistency in Guideline application. It would also leave to judicial discretion the weight assigned to different categories of conduct.

The Commission should endeavor to harmonize other Guideline provisions relating to enhancements for violence, including its meaning under Chapter 4 and interpretive case law, and define the term as suggested in the Commentary to USSG 1B1.1.

### **Bribery**

The proposed SOC relating to bribery creates the risk of unwarranted double counting under Section 3C1.1. More significantly, it is manifestly sensible that this factor be placed in Chapter Five in the event that an obstruction adjustment based on bribery fails to capture its full nature and seriousness.

### **Drug Establishment Enhancement**

If adopted, this specific offense characteristic would represent an extension of the trend toward over-criminalization. Section 856 of Title 21 of the United States Code appears aimed at non-drug related conduct by third parties who facilitate a property’s use for such activities (subsection (a)(2) provides a level reduction as such). If a defendant committed this largely distinct drug-related offense, unadjudicated offense behavior should not be used to enhance an ordinary drug defendant’s sentence unless he or she also maintains a legal or equitable interest in the subject property. Even in that case, the resultant Guideline may be “greater than necessary” due to its correlation with the amount of drugs associated with the property or establishment.

### **Enhancement Based on “Super-Aggravating” Factors**

Implementation of section 6(3) of the Act lends itself particularly well to a Chapter 5K analysis for several reasons. First, Congressional micromanagement of the adjustment for Role in the Offense, USSG §§3B1.1-3B1.2, is counterintuitive based on

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(2003)(draft)(suggesting that the federal system requires simplification, decreased rigidity, and a reduction of the guidelines' current emphasis on quantifiable factors); Constitution Project's Sentencing Initiative, *Principles for the Design and Reform of Sentencing Systems*, reprinted in 17 FED. SENTENCING REP. 341, 341 (2005).

<sup>10</sup> 18 U.S.C. §3553(f)(2), USSG 5C1.2(a)(2).

the agency's settled institutional expertise. Second, the proposed classifications apply to extraordinary aggravating factors better accounted for under Chapter Five. Third, the proposal significantly overlaps with other Guideline sections and unnecessarily complicates sentencing. Finally, the proposal contains a "kitchen sink" of offense characteristics better considered outside the structure of Chapter Two.

### **Conclusion**

NACDL applauds both Congress and the Commission for this critical extension of sentencing reform. Elimination of the 100:1 ratio and implementation of the Act by the Commission is a milestone on the path to fairer drug sentencing. Still, it is not enough. The need for retroactivity now is manifest. The Commission should not wait for the next amendment cycle to make these emergency adjustments to the Guidelines retroactive. For many prisoners, justice delayed will be justice denied.

Furthermore, rather than executing congressional mandates through Chapters Two and Three of the *Guidelines Manual*, NACDL respectfully recommends that any Guideline change resulting from the Act should provide an "additional penalty" in the nature of a guided departure under Chapter 5K. This, we believe, is consistent with the legislative directive and a proper construction of *Booker*.

We are grateful for the opportunity to submit public comment on behalf of our membership and respectfully urge your utmost consideration. Thank you.

Sincerely,

BENSON WEINTRAUB  
Co-Chair, Sentencing Committee  
National Association of Criminal Defense Lawyers